No. 77-453

In the Supreme Court of the United States

OCTOBER TERM, 1977

EASTEX, INCORPORATED, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26a–42a) [1] is reported at 550 F. 2d 198. Its order modifying its opinion and denying petitioner's requests for rehearing and rehearing *en banc* (Pet. App. 44a–47a) is reported at 556 F. 2d 1280. The decision and order of the National Labor Relations Board (Pet. App. 4a–25a) are reported at 215 NLRB 271.

[1] "Pet. App." refers to the appendix to the petition. "App." refers to the separate appendix to the briefs.

JURISDICTION

The judgment of the court of appeals (Pet. App. 43a) was entered on August 29, 1977, and petitions for rehearing and rehearing *en banc* were denied on August 5, 1977 (Pet. App. 44a). The petition for a writ of certiorari was filed on September 22, 1977, and was granted on January 23, 1978 (App. 24). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8. (a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that employee distribution of a union news

bulletin which concerned, *inter alia,* a state right-to-work law and a federal minimum wage law, was concerted activity protected by Section 7 of the National Labor Relations Act, and that the Company violated Section 8(a)(1) of the Act by prohibiting such distribution on nonworking time in nonworking areas of the plant.

STATEMENT

1. The United Paperworkers International Union, Local 801 (the Union) has represented the production employees of petitioner (the Company) since 1954 (Pet. App. 6a). In March 1974, several months before negotiations were to begin for a new collective bargaining agreement (App. 20), the Union's executive board decided to distribute among the Company's employees the following handbill (Pet. App. 1a–3a; emphasis supplied):

> NEWS BULLETIN TO LOCAL 801 MEMBERS FROM BOYD YOUNG—PRESIDENT
>
> WE NEED YOU
>
> As a member, we need you to help build the Union through your support and understanding. Too often members become disinterested and look upon their Union as being something separate from themselves. Nothing could be further from the truth.
>
> This Union or any Union will only be as good as the members make it. The policies and practices of this Union are made by the membership—*the active membership.* If this Union

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has ever missed its target it may be because not enough members made their views known where the final decisions are made—The Union Meeting.

It would be impossible to satisfy everyone with the decisions that are made but the active member has the opportunity to bring the majority around to his way of thinking. This is how a democratic organization works and its the best system around.

Through participation you can make your voice felt not only in this Local but throughout the International Union.

A PHONY LABEL—"RIGHT TO WORK"

Wages are determined at the bargaining table and the stronger the Union, the better the opportunity for improvements. The "right to work" law is simply an attempt to weaken the strength of Unions. The misleading title of "right-to-work" cannot guarantee anyone a job. It simply weakens the negotiating power of Unions by outlawing provisions in contracts for Union shops, agency shops, and modified Union shops. These laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life. At this time there is a very well organized and financed attempt to place the "right to work" law in our new state constitution. This drive is supported and financed by big business, namely the National Right-To-

Work Committee and the National Chamber of Commerce. If their attempt is successful, it will more than pay for itself by weakening Unions and improving the edge business has at the bargaining table. States that have no "right-to-work" law consistently have higher wages and better working conditions. Texas is well known for its weak laws concerning the working class and the "right-to-work" law would only add insult to injury. If you fail to take action against the "right-to-work" law it may well show up in wages negotiated in the future. I urge every member to write their state congressman and senator in protest of the "right-to-work" law being incorporated into the state constitution. Write your state representative and state senator and let the delegate know how you feel.

POLITICS AND INFLATION

The Minimum Wage Bill, H.R. 7935, was vetoed by President Nixon. The President termed the bill as inflationary. The bill would raise the present $1.60 to $2.00 per hour for most covered workers.

It seems almost unbelievable that the President could term $2.00 per hour as inflationary and at the same time remain silent about oil companies profits ranging from 56% to 280%.

It also seems disturbing, that after the price of gasoline has increased to over 50 cents a gallon, that the fuel crisis is beginning to disappear. If the price of gasoline ever reaches 70 cents a gallon you probably couldn't find a closed filling station or empty pump in the Northern Hemisphere.

Congress is now proceeding with a second minimum wage bill that hopefully the President will sign into law. At $1.60 per hour you could work 40 hours a week, 52 weeks a year and never earn enough money to support a family.

As working men and women we must defeat our enemies and elect our friends. If you haven't registered to vote, please do so today.

FOOD FOR THOUGHT

In Union there is strength, justice, and moderation;

In disunion, nothing but an alternating humility and insolence.

COMING TOGETHER WAS A BEGINNING
STAYING TOGETHER IS PROGRESS
WORKING TOGETHER MEANS SUCCESS
THE PERSON WHO STANDS NEUTRAL,
STANDS FOR NOTHING!

The decision to distribute the handbill or "news bulletin" was made, according to Union president Boyd Young,[2] because:

> We were going into negotiations, and * * * we was trying to reorganize our group into a stronger group. We were trying to get members, people that were working there who were nonmembers, and trying to motivate or strengthen the conviction of our members, and it was to organize a little. [Pet. App. 14a, 38a; App. 11.]

[2] Young is a longtime employee of the Company, on leave of absence to serve as Union president (Pet. App. 14a, n. 9).

On March 26, Company employee Hugh Terry, a vice president of the Union, asked Company assistant personnel director Herbert George for permission "to hand out this news bulletin to the employees in the clock alley" or "to set up a table in the clock alley with a stack of * * * copies on it so the employees could pick it up as they came and went to work" (Pet. App. 13a; App. 16, 21).[3] Terry explained that the Union "normally * * * mailed this type of information to the employees, but with the increase in postal rates [the Union believed it] could save a little money by having it passed out in this fashion" (Pet. App. 13a; App. 21). George responded that he doubted the Company would allow the Union to "hand out propaganda like that" but promised to "check it with higher management" (Pet App. 13a; App. 17, 21). A few days later George informed Terry that the Company would not allow distribution of the handbill in the clock alley, but gave no reason for the denial (Pet. App. 13a; App. 17, 22).

On April 22, Union president Young, accompanied by Terry and another employee, met with George and again requested permission for employees[4] to distribute the handbill. Young stated that, if the clock

[3] The clock alley is a passageway six to seven feet wide and is physically discrete from the production areas of the plant. It contains the timeclocks, as well as vending machines, a bulletin board, and chairs for people waiting to transact business in the administrative offices which flank the area. (Pet. App. 13a, n. 7; App. 4, 12–13.)

[4] The Administrative Law Judge credited Young's testimony that his request was couched in terms of employees (Pet. App. 14a, n. 9).

alley "posed a problem, we would be willing to move to any area convenient to the Company, out on the end of the walk or guardhouse or parking lot, that we would only hand it out to employees leaving the plant, and where it wouldn't cause a litter problem in the plant" (Pet. App. 13a–14a; App. 8–9, 23). After conferring with Company personnel director Leonard Menius, George reiterated the Company's refusal to permit distribution, stating only that the Union had other ways to communicate with its members (Pet. App. 14a; App. 9, 23).

The Union filed an unfair labor practice charge with the Board. At the Board hearing, Company personnel director Menius stated that he would not have objected to distribution of the first and fourth sections of the Union's handbill, but denied permission to distribute the handbill because the rest of the document, dealing with the state right-to-work law and the federal minimum wage, did not relate to the Company's "association with the Union" (Pet. App. 16a; App. 18–19).

2. The Board, adopting the decision of its Administrative Law Judge, found that the Company violated Section 8(a)(1) of the Act by prohibiting distribution of the handbill on the employees non-working time in non-working areas of the plant (Pet. App. 24a, 20a).[5] Following prior decisions, the Board construed

[5] The Board also found that the Company violated Section 8(a)(1) of the Act by maintaining a rule barring union and related solicitation by employees during non-working time (Pet. App. 20a). The Company did not challenge that finding below (Pet. App. 31a, n. 3) and it is not at issue here.

Section 7 of the Act as protecting not only activities "'directly and immediately involving the employment relationship,'" but also those which are "'pertinent to a matter which is encompassed by section 7'" (Pet. App. 16a). Applying this principle, the Board concluded that the handbill fell well within Section 7's protection.

Thus, regarding the second section of the handbill, the Board stated: "Union security being central to the union concept of strength through solidarity, and being moreover a mandatory subject of bargaining in other than right-to-work states, it is plain that [the Union's] commentary [on incorporating a right-to-work provision in the state constitution] is 'pertinent to a matter which is encompassed by Section 7 of the Act'" (Pet. App. 17a). And, regarding the third section, dealing with the veto of the federal minimum wage law and urging the election of legislators favorable to a higher minimum wage, the Board concluded that it "also is pertinent in terms of Section 7, even though [the Company's] employees receive well over the sought-after minimum wage. The minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum." (Pet. App. 18a.)

Finally, the Board held that, even if the Company were correct that "only portions of the circular bore Section 7 pertinence," it would not have been justified in denying its distribution. As the Board had previously ruled, an employer is not justified in prohibit-

ing the distribution of protected union literature merely because a portion of it may constitute extraneous "social comment." (Pet. App. 18a.)

The Board ordered the Company, *inter alia,* to cease and desist from "[p]rohibiting employees from distributing literature on nonworking time in nonworking areas concerning matters relating to the exercise of their Section 7 rights" (Pet. App. 21a).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 26a–42a).[6] The court held (Pet. App. 36a; emphasis in original) that "whatever is reasonably related to the employees' *jobs* or to their status or condition as employees in the plant may be the subject of such handouts as we treat of here * * *." The court concluded that the material in question satisfied this test (Pet. App. 39a–41a):

> One can hardly imagine a matter on which organized labor * * * has a more direct interest than right-to-work laws. * * *
>
> * * * * *
>
> Part [2] [of the bulletin] appeals to the workers with respect to circumstances that involve the effectiveness of the union as an institution. The workers have a real interest in bringing to bear whatever political pressure they might have in order to affect conditions they perceive to be a threat or, vice versa, in their favor. It was within § 7 protection.

[6] The court of appeals, however, rejected the Board's alternative holding that, even if the disputed portions of the bulletin had been unprotected, the Company's ban on the distribution of the circular would still have been unlawful (Pet. App. 41a–42a).

> Although a bit more tenuous, we think part [3] "Politics and Inflation," is, likewise, protected. Clearly, a minimum wage law even in a company that has a minimum wage of $3.86 has a great deal of bearing, from an economic standpoint, on employment and wage levels. Minimum wage is a recurring item in annual negotiations between unions and employers. The national minimum wage may very well have a direct bearing on skilled labor beyond those covered under the minimum wage act. [Footnote omitted.][7]

SUMMARY OF ARGUMENT

A

1. Petitioner's principal contention in this case is that Section 7 of the National Labor Relations Act covers only activities that are related to a specific dispute between employees and their immediate employer over matters that the employer has the right or power to control, and therefore that Section 7 does not cover the distribution of the news bulletin in this case because two of the four paragraphs of the bulletin did not pertain to a dispute over matters that petitioner had the right or power to affect. If petitioner's claim that Section 7 does not cover the distribution of the news bulletin were correct, nothing in

[7] The court denied the Company's petition for rehearing, but amended its decision to delete references to the First Amendment contained in its opinion, in conformance with the admonition in *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, to determine the content of Section 7 rights under statutory rather than constitutional principles (Pet. App. 45a–47a).

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the Act would restrain an employer from taking retaliatory action, including discharge, against employees involved in distributing such circulars, either on or off the employer's premises.

Petitioner's narrow construction is contrary to the language of Section 7, its history and the decisions of the Board and the courts construing it. It is contrary to the language of Section 7 because specific employee-employer disputes over matters within the employer's direct power to affect would almost always be the subject of mandatory collective bargaining over the terms and conditions of employment under the obligation imposed by Sections 9(a) and 8(a)(5) and (3). By its terms, however, Section 7 protects the rights of employees, *inter alia*, to "engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*" (Emphasis supplied.)

Moreover, the history of Section 7 demonstrates that the very purpose of including the "other mutual aid or protection" clause in the statute was to provide protection to employees for concerted activities related to their interests and status as employees which go beyond seeking a specific objective from their immediate employer. Accordingly, the Board and the courts have consistently construed and applied Section 7 as including more than activities related to matters over which the employer has direct control, including, for example, activities by employees for the purpose of showing solidarity and support for the employees of other employers. Indeed, petitioner's narrow construction of Section 7 was recently rejected in *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, in which the Court held that Section 7 protects the distribution of literature by employees on the employer's property seeking to persuade other employees to reject their union representative, although such matters do not involve a dispute with the employer and the employer has no right or power to affect them.

Thus, the court of appeals correctly rejected petitioner's construction of Section 7 and adopted and applied a standard that is certainly within the compass of Section 7. Indeed, the history of Section 7 and the authorities construing it suggest that the court of appeals' standard focuses too narrowly and exclusively on matters that affect the particular jobs of the employees in the plant. The court's standard, however, correctly reflects the principle that activities covered by Section 7 are not limited to employee-employer disputes on matters that the employer has the power to affect, and also the principle that Section 7 applies comprehensively to all matters that reasonably relate to employees in their status as employees.

2. The distribution of the union news bulletin was an activity covered by Section 7. Sections 1 and 4 of the bulletin, advocating support for the Union and the principles of collective action, were clearly covered by Section 7 and petitioner has never suggested otherwise. Sections 2 and 3 of the bulletin were related to and amplified the theme of Sections 1 and 4, by urging concerted action with respect to legislative

changes affecting union security (the Texas right-to-work laws) and minimum wage laws. As the court of appeals recognized, those changes had substantial impact on the employees' jobs and on their status as Section 7 and cases construing it, those changes were also of legitimate concern to petitioner's employees by virtue of their effect on other employees for whose "mutual aid or protection" petitioner's employees are entitled to engage in concerted activity.

employees in the plant. In light of the history of

If, as we contend, the distribution of the news bulletin was a right covered by Section 7, then the cases establish that it may be appropriate to accommodate the exercise of that right to the employer's property interests. Petitioner errs, however, in contending that its property interests justified its blanket prohibition of the distribution of the bulletin by employees on non-working time in non-working areas. Decisions of the Board and this Court have established that an employer may not ban the distribution of protected employee literature by employees on non-working time in non-working areas in the absence of a showing of "special circumstances" pertaining to production and plant discipline justifying such a ban. Petitioner has shown no circumstances justifying its blanket prohibition, and instead has relied entirely on its naked property interest and on its claim that the distribution of the news bulletin was not protected by Section 7 be-

cause of its subject matter. In those circumstances, there was no occasion for the Board to engage in a balancing of the employer's interests against the Section 7 rights of the employees.

C

As an alternative ground for its decision, the Board held that, even if Sections 2 and 3 of the bulletin did not involve matters within the scope of Section 7, petitioner was not justified in prohibiting its distribution in light of those portions of the bulletin that were concededly within the scope of Section 7. The court of appeals erroneously rejected that alternative ground for decision and misconceived the Board's holding. The Board did not hold or suggest that the inclusion, however insignificant, of protected material in otherwise unprotected material would protect the distribution of the literature as a whole. Rather the Board's holding, as reflected by the context of this case and the cases on which it relied, was that Section 7 protects the distribution of literature if it is in substantial part devoted to matters within the scope of Section 7, even though it also contains unprotected social or political comment. We submit that that position is correct and provides an alternative basis for affirming the judgment below. Otherwise an employer would be able substantially to undermine the protection of Section 7 by prohibiting distributions if its scrutiny of the literature revealed any extraneous social comments within it.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE EMPLOYER VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING EMPLOYEE DISTRIBUTION OF THE UNION NEWS BULLETIN ON NON-WORKING TIME IN NON-WORKING AREAS OF THE PLANT

A. DISTRIBUTION OF THE UNION NEWS BULLETIN WAS AN ACTIVITY PROTECTED BY SECTION 7

Section 7 of the National Labor Relations Act guarantees to employees:

> [t]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights.

The determination of whether activities by employees on the employer's property are protected under the Act from employer restraint requires two inquiries. The first inquiry is whether the activities come within the broad terms of Section 7, set forth above. The second inquiry is whether, if the activity is within the scope of Section 7, the employer's legitimate interests in production and work discipline justify its limitation of that activity under the circumstances. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797–798. See also *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 522; *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, 344.

The principal issue in this case involves the first inquiry—whether distribution by employees of the circular in question was an activity within the scope of Section 7. We address this question in this point A of the Argument, and address the second inquiry in point B, *infra*, pp. 36–39.[8]

1. *Activity is within the scope of Section 7 if it is reasonably related to the employees' interest and status as employees*

The court of appeals held that Section 7 encompasses employee distribution of literature concerning matters that are "reasonably related to the employees' *jobs* or to their status or condition as employees in the plant * * *" (Pet. App. 36a). It is difficult to see

[8] The distinction between these issues is important because if a particular activity is not protected by Section 7 at all, then nothing in the Act restrains the employer from taking retaliatory action with respect to that activity, whether it is undertaken on the employer's premises or not. If, for example, the distribution of the circular involved in this case were determined to be an activity not covered by Section 7, then nothing in the Act would prohibit the employer from discharging employees involved in its distribution either inside or outside the employer's property (although the employees may have contractual rights limiting the grounds for employer discipline or discharge). If, on the other hand, distribution of the circular is within the scope of Section 7, then the cases establish that it may be appropriate to balance the employees' need to exercise that right on the employer's premises against the employer's property interests in production or plant discipline to determine whether particular limitations on that activity are warranted under the circumstances.

on the face of it any substantial difference in petitioner's general formulation of the standard—that is, that "[t]he activity must have a significant connection to the relationship between employer and employee in order to be protected" (Br. 7, see also Br. 19). The difference between petitioner's proposed standard and the court's appears, however, from petitioner's *explanation* of its standard. Petitioner states (Br. 13) that in order to be protected by Section 7 an activity should contain the following elements:

> (1) the existence of a specific dispute; (2) with the employer; (3) over an issue which the employer has the right or power to affect.

As thus explained, petitioner's contention is contrary to the language and purpose of Section 7 and to the cases construing and applying it.

Petitioner's contention is contrary to the language of Section 7 because matters that contain the three elements identified by petitioner would almost always be the subject of mandatory collective bargaining concerning terms and conditions of employment under the obligation imposed by Sections 9(a) and 8(a)(5) and (3) of the Act, 29 U.S.C. 159(a), 159(a)(5), and (3). See, *e.g.*, *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 211. By its terms, however, Section 7 encompasses more than activities directed to collective bargaining; it guarantees employees the right, *inter alia*, "to engage in other concerted activities for the purpose of collective bargaining *or other mutual aid or protection*" (emphasis supplied). Petitioner's position that Section

7 is limited to matters involving specific employee disputes with their own employer and matters within the employer's control would largely read the "other mutual aid or protection" clause out of the statute.

Moreover, that position is contrary to the history of Section 7, which shows that the principal purpose of that section was to provide employees with the protection of federal law for activities that go beyond those seeking a specific objective from the employee's own employer in the context of a specific dispute with that employer.

Section 7 derives from the Norris-LaGuardia Act, 47 Stat. 70, which was enacted in 1932 to limit the jurisdiction of federal courts to issue injunctions in labor disputes. Prior to that Act, most courts treated the concerted action of employees in labor matters as a tortious and enjoinable conspiracy unless the employees were directly employed by the employer affected and sought an objective which, in the court's judgment, had a direct relation to the benefits they were seeking to attain.[9] The Norris-LaGuardia Act sought to eliminate these subjective judgments by withdrawing federal jurisdiction to enjoin certain activities arising "out of any labor dispute" (now 29 U.S.C. 104), and by defining "labor dispute" in Section 13(c) to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in * * * seeking to arrange terms or conditions of employment,

[9] See Frankfurter and Greene, *The Labor Injunction* 26–29 (1930); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443.

regardless of whether or not the disputants stand in the proximate relation of employer or employee" (now 29 U.S.C. 113(c)).[10] It also declared in Section 2 that it is the public policy of the United States that a worker (now 29 U.S.C. 102)

> have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.[11]

In language virtually identical to Section 2 of the Norris-LaGuardia Act, Section 7 of the Wagner Act provided that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

[10] See Frankfurter and Greene, *supra*, at 216–217.

[11] The Senate Report on the bill, which was ultimately enacted, stated (S. Rep. No. 163, 72d Cong., 1st Sess. 9 (1932)): [W]age earners [have the right] to organize and to act jointly in questions affecting wages, conditions of labor, and the *welfare of labor generally*."

Moreover, like Section 13(c) of the Norris-La Guardia Act, Section 2(9) of the Wagner Act defined the term "labor dispute" to include cases where the disputants do not stand in the proximate relation of employer and employee (now 29 U.S.C. 152(9)),[12] and Section 2(3) of the Wagner Act provided that the term "employee" shall "include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicity states otherwise * * *" (now 29 U.S.C. 152(3)).[13]

As this Court stated in *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 191–192:

> The policy which [Congress] expressed in defining "employee" both affirmatively and negatively, as it did in § 2(3), had behind it important practical and judicial experience. "The term 'employee,'" the section reads, "shall include any employee, and shall not be limited to the employees of a particular em-

[12] As stated in S. Rep. No. 573, 74th Cong., 1st Sess. 7 (1935): "[U]nfair labor practices may, by provoking a sympathetic strike for example, create a dispute affecting commerce between an employer and employees between whom there is no proximate relationship. Liberal courts and Congress have already recognized that employers and employees not in proximate relationship may be drawn into common controversies by economic forces. There is no reason why this bill should adopt a narrower view, or prevent action by the Government when such controversy occurs." See also H.R. Rep. No. 1147, 74th Cong., 1st Sess. 9–10 (1935).

[13] This definition, which has been carried over to the present Act, negates petitioner's contention (Br. 18) that Congress intended to limit the term "employee" "to one who works for a specific employer for hire."

> ployer, unless the Act explicitly states otherwise. * * *" This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. * * * The broad definition of "employ," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in §2(9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer." H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9; see also S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6, 7.

Consistently with this background, Section 7 was early interpreted to protect concerted activity which did not immediately concern the conditions of employment of the employees engaged in that activity. Thus, in *Fort Wayne Corrugated Paper Co.* v. *National Labor Relations Board,* 111 F. 2d 869 (C.A. 7), the court upheld the Board's position that an employer could not threaten an employee with discharge for engaging in union activity on behalf of employees of one of its customers. The court stated (*id.* at 874):

> The Wagner Act will not be construed to have so narrow a scope as to protect union activities only in the interrelation between the employees and employer of one company. Unionism on a national scope is too well a recognized fact to confine legal protection solely to intracompany relations.

And in *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolate Company,* 130 F. 2d 503 (C.A. 2), an employee resolution published in the newspapers supporting a "milk strike" called by a dairy farmers' union was held protected by Section 7, even though the dairy farmers were not covered by the Act. As the court, speaking through Judge Learned Hand, stated (*id.* at 505–506):

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts. So too of those engaging in a "sympathetic strike," or secondary boycott; the immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased. It is one thing how far a community should allow such power to grow; but, whatever may be the proper place to check it, each separate extension is certainly a step in "mutual aid or protection." * * *

> It is true that in the past courts often failed to recognize the interest which each might have in a solidarity so obtained * * *, but it seems to us that the act has put an end to this.
>
> * * * * *
>
> [S]o long as the "activity" is not unlawful, we can see no justification for making it the occasion for a discharge; a union may subsidize propaganda, distribute broadsides, support political movements, and in any other way further its cause or that of others whom it wishes to win to its side * * *.[14]

See also *Bethlehem Shipbuilding Corp. Ltd.* v. *National Labor Relations Board,* 114 F. 2d 930, 937 (C.A. 1): "[T]he right of employees to self-organization, and to engage in concerted activities, now guaranteed by Section 7 of the National Labor Relations Act, is not limited to direct collective bargaining with the employer, but extends to other activities for 'mutual aid or protection', including appearance of employee representatives before legislative committees."

The Taft-Hartley Act (61 Stat. 136), enacted in 1947, made a number of charges in the National Labor Relations Act, but did not materially alter the language or scope of Section 7 applicable here.[15] Thus, except for the effect of the union unfair labor practice provisions added by the Taft-Hartley Act,[16] the scope of Section 7, as reflected in Judge Hand's rationale in *Peter Cailler Kohler, supra,* remained the same.[17] The very specificity of the exceptions Congress added for certain secondary boycott activity and jurisdictional strikes (see n. 16, *supra*) confirms that it intended the scope of Section's 7's protection otherwise to remain undiminished.

Accordingly the courts and the Board have continued to interpret Section 7 as protecting a wide

[14] Petitioner seeks to distinguish *Peter Cailler Kohler* on the ground, *inter alia*, that "there was a specific dispute with management, over action taken by management, and in an area where management had the power to act" (Br. 14). Nothing in the court's rationale indicates that activities covered by Section 7 are so limited. Indeed, the last-quoted paragraph above reflects the basic consideration that the overall purposes of the NLRA in avoiding disruptions to commerce resulting from labor disputes are obviously as well served by concerted activity seeking legislative or other peaceful determinations of terms and conditions of employment that will avoid labor disputes as by activity directed to the resolution of those disputes after they arise. For early recognition by this Court of the preventive purpose of the Act, see *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 221–222.

[15] A clause was added conferring on employees the right to refrain from the protected activities and the word "other" was inserted in front of "concerted activities for the purpose of collective bargaining or other mutual aid or protection." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 38–40 (1947); 1 Legislative History of the Labor-Management Relations Act, 1947, 542–544 (1948) ("Leg. Hist."); 93 Cong. Rec. 6442–6443 (1947), 2 Leg. Hist. 1538–1539.

[16] Section 8(b)(4)(A) made it an unfair labor practice for a union and its agents to engage in certain secondary boycott activity, and Section 8(b)(4)(D) made it an unfair labor practice for them to engage in certain jurisdictional strikes. Congress rejected a much broader ban on such activities contained in the House bill. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 23–24 (1947); 1 Leg. Hist. 314–315.

[17] Indeed, this Court has since twice quoted portions of that rationale with approval. See *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 261; *Houston Insulation Contractors Assn.* v. *National Labor Relations Board*, 386 U.S. 664, 668–669.

range of employee concerted activity with respect to matters that have not involved specific disputes with the employees' own employer and which that employer has had no power to resolve or control. The archetypical example is a refusal to cross a lawful picket line of employees of another employer (see, *e.g.*, *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, 345 U.S. 71, 81–82 (Black, J., dissenting); *National Labor Relations Board* v. *Alamo Express, Inc.*, 430 F. 2d 1032, 1036 (C.A. 5), certiorari denied, 400 U.S. 1021), but many others abound.[18]

Indeed, in *National Labor Relations Board* v. *Magnavox Co.*, 415 U.S. 322, this Court upheld the Section 7 right of employees to distribute literature on company property in support of or in opposition to their

[18] See, *e.g.*, *Kaiser Engineers* v. *National Labor Relations Board*, 538 F. 2d 1379 (C.A. 9) (sending letter to legislators stating opposition to competitor employer's application to import foreign employees); *Pioneer Natural Gas Co.*, 158 NLRB 1067, 1073–1075 (aiding organizational activity of employer's customers); *Broyles & Broyles, Inc.*, 166 NLRB 834, 835–836 (complaining about non-union conditions of another employer on construction site); *Washington State Service Employees State Council No. 18*, 188 NLRB 957, 958–959 (participation in protests against other employers' racially discriminatory hiring practices); *General Electric Co.*, 169 NLRB 1101, 1103, enforced, 411 F. 2d 750 (C.A. 9) (soliciting funds during non-working time on company property on behalf of striking farm workers); *Yellow Cab, Inc.* 210 NLRB 568, 569, 570 (distribution of leaflet on company property exhorting fellow workers to attend a rally "to support employees of other employers who were on strike and to oppose an alleged antilabor combination"); *Circle Bindery, Inc.*, 218 NLRB 861, enforced, 536 F. 2d 447 (C.A. 1) (employee report to union that a customer of his employer is in violation of a union label agreement).

bargaining representative. Although the selection or rejection of a bargaining representative is a matter for the employees to decide for themselves, and is not subject to the employer's control, the Court held that Section 7 protected the employees' right to distribute such literature in the plant, notwithstanding a contractual waiver of that right by the incumbent union representative. "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *Id.* at 325.

The cases relied on by petitioner (Br. 10–18) do not reflect the application of a different principle or support petitioner's narrow construction of Section 7. In *National Labor Relations Board* v. *Bretz Fuel Co.*, 210 F. 2d 392 (C.A. 4), the court merely held that an employer had not violated Section 8(a)(1) and (3) when it refused to permit an employee of the union to continue working on its property because of his involvement in an unauthorized strike that was in breach of the union contract. In *G & W Electric Specialty Co.* v. *National Labor Relations Board*, 360 F. 2d 873 (C.A. 7), the court held that an employer had not violated Section 8(a)(1) when it discharged an employee for circulating a petition relating to a dispute among officials of the employee credit union; the court found that the interests of the employees in the operation of the credit union "was one arising from their status as borrowers or depositor-investors" and "was not an interest derived from their status as Company employees * * *." 360 F. 2d at 876. *National*

Labor Relations Act v. *Leslie Metal Arts Co., Inc.*, 509 F. 2d 811 (C.A. 6), involved a work stoppage arising in part out of a purely personal quarrel among employees. The court stated that a work stoppage "directed at circumstances other than conditions of employment" and "arising from purely personal quarrels unrelated to labor disputes with an employer" would not be protected by Section 7 (509 F. 2d at 813, 814)—statements that are not significantly different from the standard adopted and applied by the court below. In any event, the court in that case granted the Board's petition for enforcement on the ground that the walkout was in part in protest of the employer's failure to protect employees from physical violence from other employees. *Id.* at 814.[19]

[19] The other cases cited by petitioner and *amicus* Chamber of Commerce are also inapposite, *National Labor Relations Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (cited at Br. 7, 18), involved picketing that disparaged the employer's product—an attack that had nothing to do with the employment relationship. *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (cited at Br. 7), held that physical seizure of the employer's property by striking employees was not protected by Section 7. *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157 (cited at Br. 19), involved the question whether certain issues were the subject of mandatory collective bargaining under Section 8(a)(5). This case does not involve that question and, as noted, Section 7 by its terms encompasses more than activities directed to collective bargaining. *Shelly & Anderson Furniture Mfg. Co.* v. *National Labor Relations Board*, 497 F. 2d 1200 (C.A. 9), and *National Labor Relations Board* v. *Tanner Motor Livery Ltd.*, 419 F. 2d 216 (C.A. 9) (cited at Br. 8 n. 4, 15), did not involve the question whether the object of the protest was protected (the court in *Tanner* expressly recognized that it would be), but whether the means employed were protected.

In sum, the history of Section 7 and the cases construing it refute petitioner's contention that Section 7 encompasses only activities that are related to specific disputes between the employees and their employer over matters that the employer has the right or power to affect.[20]

The court of appeals, on the other hand, correctly applied established principles under Section 7. Although that court's formulation of the standard is in our view too narrowly focused on the relation of the employees with their own employer,[21] within that context the court correctly recognized the principle that

[20] Apart from the fact that petitioner's test is contrary to the language and purpose of Section 7 and the authorities construing it, any test that depended on the determination of an employer's right or power to affect a matter would present considerable difficulties of administration. An employer's "right" or "power" to "affect" a particular matter of employee concern would often be difficult to assess. Consider for example the issue of safe working conditions—a matter of obvious and direct concern to employees and one which the employer has clear power to affect. If employees sought the support of other employees for a public campaign on that issue that included support for legislative proposals, it would be difficult to determine how much "power" the employer had to "affect" the outcome of that issue. The employer plainly has the power or right to affect conditions in his own plant, but his power to affect the outcome of legislative proposals would turn on any number of political factors, including, perhaps, the effectiveness of his trade association in the state legislature.

[21] As the cases cited above establish (pp. 22–27, *supra*), Section 7 also encompasses concerted activities by employees in support of the employees of other employee. The principle that matters directly concerning certain employees also affects the interests of other employees—whether or not employed by the same em-

Section 7 rights include more than activities directed to collective bargaining or concerning matters that the employer has the right or power to affect. The court also correctly recognized, as the Board has held,[22] that Section 7 and the Act as a whole are concerned with employees in their status as employees, and does not encompass activities that are not reasonably related to that status.

Whether a particular activity is or is not reasonably related to the employees' status as employees is a question that turns on the "distinctive facts" of each case. *National Labor Relations Board* v. *Leece-Neville Co.*, 396 F. 2d 773, 774 (C.A. 5). We now show that the court correctly upheld the Board's determination that the particular circular involved in this case was sufficiently related to the employees' jobs or their

ployer—underlies the Act and is reflected in the very phrase "concerted activities for * * * *mutual* aid and protection." (Emphasis supplied.) See *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 260–262.

[22] For example, the Board has recognized that not all literature distributed by employees is reasonably related to their status as employees. In *Ford Motor Company*, 221 NLRB 663, the Board held that Section 7 protected distribution on company property by a dissident employee group of a newsletter dealing, *inter alia*, with national economic affairs and company overtime policies. At the same time, the Board found unprotected another newsletter which was "purely a political tract exhorting employees not to support the traditional parties and their candidates in the 1974 congressional elections, but to seek an independent workers' party. This is wholly political propaganda which does not relate to employees' problems and concerns *qua* employees." *Id.* at 666. See also *McDonnell Douglas Corp.*, 210 NLRB 280.

status as employees to warrant the protection of Section 7.

2. *The court of appeals correctly held that the union circular here had a reasonable relationship to the employees' jobs or their status as employees*

As noted, *supra*, p. 6, the Union's main reason for attempting to distribute its news bulletin was to "try to * * * strengthen the conviction of [its] members" and "try to get people who were working there [at the Company] who were nonmembers" to join. Sections 1 and 4 of the newsletter speak directly to the need for employees to join the Union and actively participate in its activities. Section 1 informs the Union's membership of the advantages of active participation in Union affairs and urges that employees attempt to influence the making of the Union's decisions by attending Union meetings and making their views known. Section 4 informs the employees of the advantages of "working together," exhorting employees who "stand Neutral" to accept the "strength, justice, and moderation" of unionism. These sections of the leaflet, as the Company acknowledged, directly concern the Union's position as a bargaining representative for the Company's employees, and the extent to which it will have the support of the work force in the forthcoming contract negotiations. In the words of Section 7, employee distribution of the circular as it related to those sections was an exercise of their "right to self-organization [or] to form, join, or assist labor organizations * * *."

The record also reflects that Sections 2 and 3 of the news bulletin were included for largely the same reasons—that is, to impress upon employees the importance of solidarity and collective action by relating those principles to specific matters of concern to the employees. To the extent those sections did not expressly exhort membership in the Union,[23] they nevertheless concerned matters of substantial concern to the employees as employees and their distribution was therefore for the purpose of "mutual aid or protection" within the scope of Section 7. Section 2 of the leaflet states the Union's view of the adverse effect upon unions of right-to-work laws; it speaks, in particular, to the danger of incorporation of the Texas right-to-work law into the state constitution, and also appeals to employees to write their representatives urging rejection of such action on that issue. Section 3 of the newsletter discusses President Nixon's veto of the minimum wage bill and urges employees to register to vote to support candidates favorable to an increase in the minimum wage. These sections were designed to provide information to the employees about matters arguably impinging significantly on their economic welfare. And both sections invited employees to

[23] But see the statements in Section 2: "[Right-to-work] laws do not improve wages or working conditions but just protect free riders. Free riders are people who take all the benefits of Unions without paying dues. They ride on the dues that members pay to build an organization to protect their rights and improve their way of life."

Those statements appear in part to serve the purposes of strengthening the conviction of union members and exhorting nonmembers to join.

take action which, if ultimately successful, might well improve the Union's position at the bargaining table.

As the Board noted, union security is "central to the union concept of strength through solidarity" (Pet. App. 17a) and would be a mandatory subject of bargaining in the absence of a state right-to-work law. The Union's interest in repeal of the state right-to-work law obviously would be set back if the law were to be incorporated in the state constitution, thereby making its repeal much more difficult. The level of the minimum wage is also of concern to the Company's employees, even though their rates were above the vetoed rate, because, as the Board stated, "[t]he minimum wage inevitably influences wage levels derived from collective bargaining, even those far above the minimum" (Pet. App. 18a).[24] Moreover, the vetoed legislation would directly affect the terms and conditions of employment of other employees, for whose "mutual aid or protection" petitioner's employees are entitled to exercise rights under Section 7 (see pp. 22–26, *supra*).

Nor are Sections 2 and 3 of the leaflet removed from the protection of Section 7 of the Act merely because they encourage traditional political action. As

[24] See Chamberlain, *Labor*, 435–437 (1958); Reynolds, *Labor Economics and Labor Relations* 272, (5th ed. 1970); Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Fair Labor Standards Amendments of 1974, 94th Cong., 2d Sess., 868 (Committee Print 1976), (remarks of Senator Dominick, July 18, 1973). Cf. Marshall, *et al.*, *Labor Economics* 355–358 (3rd ed. 1976).

shown above (pp. 18–27), the language, history, and consistent Board and judicial interpretation of Section 7 negate any suggestion that it concerns only matters that are within the direct control of the employees' employer. Moreover, petitioning the legislature for the enactment of laws which will improve working conditions, or voting for legislators who are sympathetic to such laws, is a traditional (and constitutionally favored) means by which employees, no less than other citizens, can achieve such improvements; indeed, legislative change is often a precondition to negotiation with the employer about a subject.[25]

There is no reason to attribute to Congress an intent not to protect under Section 7 such essential and traditional means of improving employee working conditions—an intent that would be hard to reconcile with the Act's declared policy of "protecting the exercise * * * of full *freedom of association,* self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (29 U.S.C. 151, emphasis added). That was the conclusion reached in *Kaiser Engineers* v. *National Labor Relations Board*, 538 F. 2d 1379 (C.A. 9), in which the court held that Section 7 protected a civil engineer against discharge for joining with other employees in a letter to United States legislators stating their opposition to a competitor employer's application to the Department of Labor for permission to import foreign engineers. In language equally pertinent here, the court stated (*id.* at 1385):

> It is true, as Kaiser Engineers points out, that the activity involved no request for action on the part of the company, did not concern a matter over which the company had direct control, and was outside the strict confines of the employment relationship. It is also true, however, that the members of the Civil Engineering Society had a legitimate concern in national immigration policy insofar as it might affect their job security.
>
> We conclude that the concerted activity of employees, lobbying legislators regarding changes in national policy which affect their job security, can be action taken for "mutual aid or protection" with the meaning of § 7 * * *.[26]

Cf. *National Labor Relations Board* v. *Industrial Union of Marine and Shipbuilding Workers of America,* 391 U.S. 418, 424.

In sum, the court of appeals correctly upheld the Board's determination that distribution of each of the

[25] For example, in a right-to-work state like Texas, the employees could not negotiate a union security agreement with the employer unless they had first obtained a repeal of the right-to-work law.

[26] Petitioner contends (Br. 15) that *Kaiser Engineers* is distinguishable because the employees there "sought a specific result on an issue of threatened job security." However, the employees in *Kaiser* were not protesting any action taken by their employer which had a direct or immediate effect on their employment conditions. Rather, they were protesting against an exemption from existing law requested by another employer which might in the future have an adverse impact on those conditions.

four sections of the news bulletin constituted the exercise of rights protected by Section 7.[27]

B. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S BAN ON THE DISTRIBUTION OF THE NEWS BULLETIN IN NON-WORKING AREAS ON NON-WORKING TIME WAS NOT JUSTIFIED BY PETITIONER'S PROPERTY INTERESTS

If the Court were to accept petitioner's principal contention that the distribution of the news bulletin was outside the scope of Section 7 because of the content of two of its sections and also to reject our alternative ground for affirmance of the court of ap-

[27] The court's decision upholding the Board's determination that the distribution of the news bulletin was within the scope of Section 7 is further supported by two additional considerations that should guide judicial review of such determinations. First, the application of general standards to particular facts is primarily the task of the agency charged with the administration of the statute, and courts should defer to the agency's determination if it falls within a zone of reasonableness. As this Court recently reiterated in *National Labor Relations Board* v. *Weingarten, Inc.*, 420 U.S. 251, 266–267, Congress entrusted to the Board the primary responsibility for elucidating the scope of Section 7.

Second, the declared policies of the National Labor Relations Act indicate that the scope of employee rights protected by Section 7 should not be rigidly or narrowly construed (*supra*, p. 34). As we next discuss, the Board and the courts have the capacity to accommodate the *exercise* of those rights to an employer's legitimate property interests. But the Board and the courts should not narrowly construe the scope of those rights themselves, lest employees be stripped of all protection for activities within the concern of the Act, and lest, in this context particularly, the Board be cast in the role of censor minutely scrutinizing and ruling upon the subject matter of employee literature. Cf. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 120–121.

peals' decision (discussed in point C, *infra*), then the Act would not restrain petitioner's ban on the distribution. Indeed, it would not restrain petitioner from discharging employees for distributing the bulletin either on or off petitioner's premises, or even for advocating the positions taken therein (see n. 8, *supra*).

If, as we urge, the Court rejects petitioner's narrow construction of Section 7, then the question remains whether the limitations imposed by petitioner on the exercise of the employees' Section 7 rights are justified by its legitimate interests in such matters as production or plant discipline. For it is well settled that when conflicts arise between the exercise of Section 7 rights and private property interests, the Board and the courts are to seek a proper accommodation between the two "with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board* v. *Babcock and Wilcox Co.*, 351 U.S. 105, 112; see also *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 521.

As an alternative to its principal position, therefore, petitioner contends that its property interests here outweigh the "nature and strength of the Section 7 rights asserted" in this case (Br. 26–30). We disagree.

Although accommodation between property interests and Section 7 rights depends on the facts of each case, the Board and the courts have established general principles governing that determination. The principle that is most firmly established by decisions of the Board and this Court is that the distribution

of union literature (1) by employees lawfully on the premises, (2) on non-working time, and (3) in non-working areas, may not be prohibited by the employer "'in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.'" *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 804 n. 10 (quoting from the Board's decision in *Peyton Packing Co., Inc.,* 49 NLRB 828, 844). As the Court noted in *Hudgens* v. *National Labor Relations Board, supra,* 424 U.S. at 521–522, n. 10, Section 7 activity "carried on by employees already rightfully on the employer's property" involves "the employer's management interests rather than his property interests."

Petitioner has never advanced, and does not advance in its brief to this Court, any interest in production, discipline or other management concern that would explain or justify its blanket prohibition of the distribution of the union news bulletin by employees on non-working time in non-working areas. The only interest advanced by petitioner is a naked property interest in its premises. That interest obviously is not a "special circumstance" justifying the ban.

Nor is there merit to petitioner's contention (Br. 30) that its ban was warranted by the availability to the Union of alternate avenues of communication. This Court in *Magnavox, supra,* rejected the same contention in a case where, as here, no showing had been made of special considerations justifying a ban on union solicitations. As the Court there stated,

"[a]ccordingly, this is not the occasion to balance the availability of alternative channels of communication against a legitimate employer business justification for barring or limiting in-plant communications." 415 U.S. at 326–327.

Finally, there is no basis for petitioner's contention (Br. 31–33) that the court of appeals usurped the Board's function in arriving at a proper accommodation between the employer's interests and the employee's Section 7 rights. The cases cited above establish that employer bans on distribution of union literature by employees in non-working time and in non-working areas are presumptively invalid in the absence of special circumstances. In other words, the burden is properly upon the employer to come forward with reasons justifying the prohibition. When petitioner failed to do so, the Board expressly applied the established presumption (Pet. App. 19a) and the court correctly affirmed that decision. See *e.g., Magnavox, supra.*

C. THE JUDGMENT BELOW MAY BE AFFIRMED ON THE ALTERNATIVE GROUND STATED BY THE BOARD THAT PETITIONER COULD NOT PROHIBIT DISTRIBUTION OF THE NEWS BULLETIN IN VIEW OF THE PORTIONS THAT WERE CONCEDEDLY WITHIN THE SCOPE OF SECTION 7

In its decision the Board held, as an alternative ground, that, even if Sections 2 and 3 of the news bulletin did not have "Section 7 pertinence [petitioner] would not thereby have been justified in denying its distribution" (Pet. App. 18a). The Board

relied on its earlier decision in *Samsonite Corp.*, 206 NLRB 343, 346, where it had adopted the principle that (Pet. App. 18a):

> The fact that some of the articles in the newsletter contained gratuitous remarks or "social comment" matters does not detract from the conclusion that the distribution * * * was a concerted activity [protected by Section 7].

Accord: *The Singer Company,* 220 NLRB 1179, 1180.

The court of appeals rejected that conclusion as an alternative ground, stating that "the presence of some § 7 protected material will not rescue that which is significantly not protected" (Pet. App. 41a–42a).[28] We submit that the court misconceived the Board's alternative holding and erroneously rejected it as a valid basis for upholding the Board's decision.

The Board did not hold or suggest that the presense of *any* protected material, however sparse, would protect the distribution of material that is unprotected, however voluminous, and we do not so contend. On the other hand, it would be quite untenable to hold that an employer can comb a union news bulletin and prohibit its distribution if he finds one sentence of extraneous "social comment." Such a conclusion would seriously undermine the rights of employees under Section 7 and place the employer in the position of censor over proposals and literature of the union and its employees.

[28] The court also rejected an argument the Board had not made; namely, that "the least Eastex could have done was to excise the objectionable portions of the bulletin and permit the distribution of the unobjectionable portion" (Pet. App. 42a). The Board, in fact, made the opposite argument, i.e., that the entire leaflet was protected by Section 7 so long as it included, in substantial part, matter which was clearly within its ambit.

Rather the Board's alternative holding, viewed in the context of this case and the statement in *Samsonite* on which it relied, is that an employer may not ban otherwise protected distribution of employee literature that pertains in *substantial part* to those matters protected by Section 7, on the ground that the literature also contains unprotected social or political comment, and may not require the employees to excise the unprotected portions.[29] That standard, we submit, properly protects Section 7 rights from unwarranted restraint or interference.

Applied to the facts of this case, it properly provides an alternative basis for the Board's decision. Two of the four sections of the news bulletin (Sections 1 and 4) were clearly within the scope of Section 7 and petitioner so admitted. Moreover, Sections 2 and 3 were related to and in large part an amplication of the theme set forth in Sections 1 and 4. In those circumstances, the Board correctly concluded that petitioner could not prohibit the distribution of the bulletin even if Sections 2 and 3 did not independently come within the scope of Section 7's protection.

[29] If the protected portions and unprotected portions are readily severable, the result may be different. For example, *Ford Motor Co. supra*, n 22, involved two news bulletins, one of which was substantially unrelated to the employees' jobs or status as employees, and the Board upheld the company's prohibition of that bulletin's distribution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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